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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

Federal Communications Commission

WASHINGION. D.C. 20554

In the Matter of	)	
	)	
Revisions to Cable Television Rate Regulations	)	MB Docket No. 02-144
	)	
Implementation of Sections of The Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation	)	MM Docket No. 92-266
	)	
Implementation of Sections of The Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation	)	MM Docket No. 93-215
	)	
Adoption of a Uniform Accounting System for the Provision of Regulated Cable Service	)	CS Docket No. 94-28
	)	
Cable Pricing Flexibility	)	CS Docket No. 96-157

REPLY COMMENTS OF TIME WARNER CABLE

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No. of Copies rec'd 0+9
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Dated: December 4, 2002

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SUMMARY

Time Warner Cable fully supports NCTA's asscssnicnt that appropriate updates to the Commission's cable rate calculation rulcs can be "accomplished without a major rewrite." Any wholesale changes, at this stage in the evolution of cable rate regulation, would only foster confusion, complexity and undermine the laudable goals of predictability and national uniformity, and would be contrary to the congressional directive to minimize "administrative burdens on subscribers, cahlc operators, franchising authorities and the Commission." Time Warner Cable endorses the suggestions advanced by NCTA to fine-tune and clarify the rate rules. In particular. Time Warner Cable offers detailed proposals for revisions in three areas: I) mechanisms to streamline the process for effective competition determinations; 2) aniendment of the Commission's geographic rate uniformity rule necessitated by the sunset of CPST regulation: and *3)* rate adjustment procedures to account for the addition or deletion of channels from regulated basic service tiers.

With rcspect to the Commission's effective competition procedures, there are a number of refinements that should now be adoptcd. In the 50/15 competing provider test context: Time Warner Cable endorses the suggestion made by several parties the Commission should now presume that effective competition exists and shift the burden to the LFA to show the lack of competition. particularly in states with high concentrations of' DBS subscribers. The original presumption of the lack of effective competition can no longer be justified in light of the fact that DBS is now unquestionably a reasonable and nationuide substitute for cable. At the very minimum. the Commission should adopt a neutral burden of proof that would find effective competition if a preponderance of the evidence supports the cable operator's showing.

To ensure complete records in effective competition proceedings, the Commission should buttress a cable operator's right under Section 76.907(c) to obtain a competitor's homes passed

and subscriber numbers. The Commission should clarify that, upon request, competitors must provide homes passed and subscriber numbers that reflect single-family homes plus the total number of individual units in multiple dwelling unit buildings, regardless of whether they are individually or bulk-billed. Additionally, failure to provide a timely response should result in a tine for each day the competitor fails to respond after the 15-day deadline. The Commission should also revise Section 76.907(c) to explicitly provide LFAs the authority to request subscribership data from cable's competitors.

Further elaboration is also needed on methodologies used in identifying DBS subscribers. Time Warner Cable's recent experiences highlight some of the difficulties associated with identifying those ZIP codes that correspond, in whole or in part, with franchise areas and the variety ofresources that might be used in this process. Time Warner Cable has worked with SkyTRENDS to develop a new method to efficiently identify those 5-digit ZIP codes associated with a particular franchise area boundary. In addition to being efficient, cost-effective and based upon reliable data sources: this process allows for consistency and objectivity. Time Warner Cable requests the Commission to confirm that ZIP codes identified through this process presumptively represent the universe of ZIP codes that correspond, in whole or in part. to a particular franchise area. Naturally, interested parties would have a full opportunity to prove any discrepancies, for example, through the submission of detailed maps.

In the alternative, Time Warner Cable suggests that the Commission adopt a process whereby the cable operator submits to the LFA the list of those ZIP codes believed to cover, in whole or in part, the franchise area. The LFA would have 15 days to object to this list and to propose any specific additions or deletions. The failure to object would create a binding presumption that the list of ZIP codes is appropriate. In the event an LFA objects to the inclusion/exclusion of particular ZIP codes, it would need to provide evidence supporting its assessment of the ZJP codes associated with the franchise area.

Section 623(l)(1)(B)(ii) of the Act requires a showing that the combined penetration of all MVPDs "other than the largest" exceeds 15 percent. Given that SkyTRENDS refuses to provide a break out of individual DTH provider's subscriber data, in cases where the cable operator's subscriber total does not exceed aggregate DTH penetration, it is impossible to demonstrate which MVPD is the largest. The Commission therefore should clarify that the phrase "other than the largest" MVPD in Section 623(l)(1)(B)(ii) was simply based on the assumption that the "incumbent" MVPD would typically be the "largest" MVPD in a particular franchise area, and thus would be the party most likely to seek effective competition relief. But there is certainly no rational basis to preclude MVPDs that arc not the largest in a particular franchise area from obtaining effective competition relief. Thus, Section 76.905(b)(2)(ii) of the Commission's rules should be amended to change the phrase "other than the largest multichannel video programming distributor" to read "other than the multichannel video programming distributor seeking an effective competition ruling."

The Commission should now also refine its application of the LEC test. In various decisions applying the LEC test, the Commission has recognized that a LEC's presence has a siynilicant competitive impact upon a cable operator long before the LEC completes installing its plant or rolling out its services. As long as the LFA has met its statutory obligation by including a provision in the franchise requiring construction that will ultimately result in a "substantial overlap" of service areas according *to* an established timetable, that timetable should be considered *per se* reasonable and deemed to satisfy the test.

The Commission should decline Cverest's invitation to use this proceeding to resolve various pending geographic rate uniformity issues. Without question, the proceedings cited by

Everest have been pending for substantial periods and are ripe for decision. However, each such proceeding involves a unique set of facts and circumstances, and thus each case is best resolved on the basis of the individual record developed in the applicable proceeding. Given the complexity of many of the issues and the particularized factual situations presented, this rulemaking proceeding is not the proper forum for resolution of such cases. However, Section 76.984(a) should be amended now to delete the reference to and the applicability of the geographic rate uniformity requirement to cable programming service tiers. Given the March 31, 1999 sunset of CPST rate regulation, the geographic rate uniformity requirement very clearly now only applies to the basic service tier. Houever, the text of Section 76.984 still docs not reflect this change. Time Warner Cable therefore urges the Commission to amend Section 76.984 of its rules accordingly.

Finally, the Commission acknowledged in the *NPRM* that "operator and franchising authority practices with respect to channel deletions and cliannel movements have varied considerably" due to disagreements over the scope of the sunset provision in Section 76.922(g)(8) of the Commission's rules. That sunset provision plainly states that "Paragraph (g) of this section shall cease to be effective on January 1, 1998 unless renewed by the Commission." The provisions terminated on the face of this sunset provision include Sections 76.922(g)(4)–(5), which required a pro-rata "residual" adjustment when channels were deleted from the BST or shifted between the BST and CPST. The fact that the Commission never acted to "renew" these provisions prior to January 1, 1998 is beyond dispute. Regardless of what the Commission does going forward, the Commission should "grandfather" existing rate calculations made on the basis of a good faith interpretatioii of Section 76.922(g)(8), including calculations that, consistent with the plain language of the sunset provision and the Commission's own decisions, do not include any pro-rata or per-channel residual adjustment for the deletion of BST channels or the movement of BST channels to CPST. Time Warner Cable also supports NCTA's proposal for the adoption of a new rule that mould apply the per-channel adjustment methodology (determined without reference to unrcyulated CPST channels) on a going forward basis to BST channel additions. deletions. and shifts on an equal basis.

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Cable Pricing Flexibility	)	CS Docket No. 96-157

REPLY COMMENTS OF TIME WARNER CABLE

Time Warner Cable. by its attorneys, hereby submits these reply comments in response to the Commission's Notice of Proposed Rulemaking and Order in the above-captioned proceeding.[1] Time Warner Cable fully supports the proposals set forth in the comments of the National Cable & Telecommunications Association ("NCTA"). NCTA offers suggestions for the clarification and fine-tuning of numerous aspects of the Commission's rules and policies relating to the regulation of cable rates "in light of the March 1999 end of cable programming

[1] Notice of Proposed Rulemaking and Order, 17 FCC Rcd 11550 (2002) ("*NPRM*")

service tier [("CPST")] rate regulation."[2] In particular, Time Warner Cable agrees with NCTA's assessment that appropriate updates to the Commission's cable rate calculation rules can be "accomplished without a major rewrite." Any wholesale changes, at this stage in the evolution of cable rate regulation, would only foster confusion, complexity and undermine the laudable goals of predictability and national uniformity: and would be contrary to the congressional directive to minimize "administrative burdens on subscribers, cable operators, franchising authorities and the Commission."'

As set forth in detail below. Time Warner Cable's Reply Comments focus on three specilic issues: 1) proposals to streamline the process for effective competition determinations; 2) revision to the Commission's geographic rate uniformity rule necessitated by the sunset of CPST regulation: and 3) rate adjustment procedures to account for the addition or deletion of channels from regulated basic service tiers.

I. EFFECTIVE COMPETITION STREAMLINING

Given Time Warner Cable's considerable experience in demonstrating the existence of effective competition, there are a number of refinements to the Commission's procedures that would facilitate this process. Iniplcmentation of the changes outlined below would result in a more efficient administrative review process, benefiting the Commission, local franchising authorities ("LFAs") and cable operators alike.

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[2] *NPRM* at ¶ 1.

[3] NCTA Comments at 2.

[4] 47 U.S.C. § 543(b)(2)(A).

A. Burden of Proof

The Commission's rules. in their present form, presume that effective competition does not exist and place the burden of rebuttal on the cable operator.[5] The Commission's decision to adopt a presumption of the lack of effective competition was based on the beliefthat it would "expedit[e] implement[ing] the rate regulation provisions of the [1992 Cable] Act."[6] When the Commission adopted a presumption against effective competition back in 1993, the first high-powered direct broadcast satellite ("DBS") satellite was not yet even launched.[7] There were few overbuilders. Video dialtone was a "nascent service."[8]

The competitive landscape has changed dramatically in the intervening years. Non-cable multichannel video programming distributors ("MVPDs") accounted for approximately 23% of all MVPD customers as of the end of 2001.[9] While SMATV and wireless cable have experienced relative stability,[10] and there are a growing number of overbuilders, OVS, and

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[5] *See* 47 C.F.R. §§ 76.906. 76.907(b).

[6] *See In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, ¶ 41 (1993) ("*Rate Order*"). Notably, in its Notice of Proposed Rulemaking to implement Section 623. as revised by the 1992 Cable Act, the Commission initially proposed to place the burden on LFAs to demonstrate the lack of effective competition. *See In the Matter of Implementation of Section of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation,* Notice of Proposed Rulemaking, 8 FCC Rcd 510, ¶ 17 (1992). The fact that the Commission exercised its discretion in initially assigning the burden of proof serves to rebut those who argue that Congress established a statutory presumption against the presence of effective competition.

[7] *See Rate Order* at ¶ 32, n. 100.

[8] *See Rate Order* at ¶ 21.

[9] *See In the Matter of Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*, CS Docket No. 98-82 *et al.,* Comments of AT&T Corp. (Jan. 4, 2002), at 16-17.

[10] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, First Report, 9 FCC Rcd 7442, ¶¶ 79, 92 (1994) (reporting approximately 550,000 wireless cable, and one million SMATV, subscribers); *Annual Assessment of the Status*
(footnote continues)

broadband service providers."[11] DBS has enjoyed astounding growth and provides formidable competition to cable."[12] Since having launched the first high-powered DBS satellite system in December 1993, with approximately 600,000 households in 1994,[13] DBS subscribership reportedly now exceeds 18,400,000.[14]

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of Competition in the Market for the Delivery of Video Programming, Eighth Annual Report. 17 FCC Rcd 1244. ¶¶ 71, 75 (2002) (reporting approximately 700,000 MMDS, and 1.5 million SMATV. subscribers) ("Eighth Annual Report"),

[11] *See* Eighth Annual Report at ¶ 107 (noting the "growing importance of providers that are overbuilding existing cable systems with state-of-the-art systems that offer a bundle of telecommunications services . . . Building advanced systems allows BSPs the ability to offer a bundle of services, such as video, voice and high-speed Internet access. . . .").

[12] Despite NATOA's contrary suggestion, DBS offers an "effective competition alternative." *See* National Association of Telecommunications Officers and Advisors, the National League of Cities, and the Miami Valley Cable Council Comments at 32, 38 ("NATOA Comments"). The Commission has recognized that "[t]he growth of non-cable MVPD subscribers continues to be primarily due to the growth of DBS." *See* Eighth Annual Report at ¶ **8.** As Chairman Powell recently observed, "EchoStar and DirecTV compete vigorously, not only with cable, but with each other . . . [N]either operator is failing in its efforts to complete against cable. DBS subscriber growth rates are 2.5 tinies larger than those of cable. Cable is attempting to respond to the DBS threat by increasing channel capacity and adding new services for consumers." *See In the Matter of Application of EchoStar Communications Corp., General Motors Corp., and Hughes Electronics Corp.,* Hearing Designation Order. 17 FCC Rcd 20559 (2002) (Statement of Chairman Michael K. Powell). DirecTV and EchoStar each offer in excess of 200 programming channels, and offer local channels in "48 markets reaching more than 65 million television households.'' *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 02-145, Comments of the National Cable & Telecommunications Association (July 29, 2002), at 15-16 ("NCTA Video Competition Comments"). Cable has responded to such competition. Since 1996, cable operators have spent more than $65 billion to upgrade their systems to provide new services (*e.g.*, digital cable, digital music. high-speed Internet access. video-on-demand. interactive television, telephony). See *id.* at 3-4.

[13] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Second Annual Report, 11 FCC Rcd 2060, ¶ 49 (1995).

[14] *See* Satellite TV Subscriber Counts, National DTH Counts, located at www.skyreport.com/dth_counts.shtm (lasted visited Nov. 21, 2002). This figure represents July 2002 combined DirecTV and EchoStar subscriber data. C-Band represents an additional estimated 685.795 subscribers.

In light of these monumental changes in the competitive environment, Time Warner Cable endorses the suggestion made by several parties that the Commission should now presume that effective competition exists and shift the burden to the LFA to disprove its existence, at least in states with more than 15 percent satellite penetration.[15] Particularly in light of the fact that DBS is now unquestionably a reasonable substitute for cable, such approach would be fully justified.

At the very minimum, the Commission should adopt a neutral burden of proof in effective competition decisions. The Commission's motivations in adopting the original presumption of the lack of effective competition – administrative efficiency, LFAs' perceived lack of access to information. and expeditious implementation of rate regulation – are no longer justified.[16] LFAs have had almost a decade to certify to regulate rates, effective competition determinations by the Commission are increasing. and cable operators have no inherent advantage in compiling data relating to competitors." Rather, with a "neutral" standard, the Commission would find effective competition if a preponderance of the evidence supports the cable operator's showing. Thus, for example, unopposed petitions would be deemed granted automatically after the opposition period (20 days from the date of public notice) has run. Similarly, where an LFA seeks to regulate for the first time, the LFA would have to establish the

[15] *See* NCTA Comments at 28-29 (noting that "DBS penetration exceeds 15 percent in 44 states; 20 percent in 36 states; 25 percent in 22 states; 30 percent in 7 states; and even 40 percent in one state."): Cox Comments at 20-21; Comcast Comments at 38-42.

[16] *See Rule Order* at ¶ 41.

[17] At the time that the Commission adopted its presumption that effective competition did not exist, it had thought that it would collect data annually from cable's competitors. **See** *Rate Order* at n.145. Time Warner Cable knows of no publicly available document that includes all pertinent details regarding various competitors' reach and penetration for specific communities. Moreover, as described further below, cable operators have faced numerous obstacles in obtaining their competitors' reach and penetration data.

lack of effective competition by a preponderance of the evidence, just as the LFA must currently do when seeking to re-certify to regulate in a community where effective competition previously had been demonstrated.[18]

B. Competing Provider (50/15) Test - Cenerally

Time Warner Cable has found that. despite the Commission's good intentions, some of the mechanisms designed to assist with the effective competition process have served more to frustrate, rather than facilitate, that process. There are, however, a number of simple, practical solutions to resolve these concerns.

1. <u>Subscriber Numbers</u>

The Commission has set forth what constitutes a "household," and therefore should be counted for effective competition purposes.[19] The Commission should reiterate that competitors must provide subscriber numbers that reflect single-family homes plus the total number of individual units in multiple dwelling unit buildings, regardless of whether they are individually or bulk-billed (*e.g.*, MDU subscribers should not be reported on an "equivalent" basis, nor should an MDU account be counted as a single subscriber for effective competition purposes). The Commission should also make explicit that it intends for "courtesy" (unbilled) customers to be reflected in that count since they represent households that receive service from a MVPD other than the cable operator.

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[18] *See* 47 C.F.R. § 76.916.

[19] *See Rate Order* at ¶ 34; *see also In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Third Order on Reconsideration, 9 FCC Rcd 4316, ¶¶ 15-17 (1994); 47 C.F.R. § 76.905(c).

2. Competitor Subscriber Number Requests

In an attempt to ensure ready access to the information necessary to demonstrate effective competition, the Commission has directed competitors to provide reach and penetration information within 15 days of a request, where such information is not otherwise available.[20] Unfortunately, Time Warner Cable's attempts to exercise this right have proven frustrating and subject to abuse

The satellite industry has steadfastly refused to directly provide cable operators with reach and penetration information." a position seemingly accepted by the Commission. **As** the Commission noted in its recent *Denton, Texas* case,

> Pursuant to Section 76.907(c) of the Commission's rules, cable operators may request subscriber information from competitors for effective competition purposes. This subscriber information may be limited to numerical totals. The Commission has accepted DBS subscriber reports from SkyTrends on behalf of the DBS providers in satisfaction of this requirement."

Cable operators have historically faced considerable obstacles in obtaining timely information from SkyTRENDS. At one point. Time Warner Cable had a backlog of numerous untilled orders: covering approximately 150 local franchise areas, some of which had been

[20] We *Rute* ***Order*** at ¶ 44; 47 C.F.R. § 76.907(c).

[21] After facing delays that in some cases exceeded several months — attributed by SkyTRENDS to the failure of one or more of the DTH satellite providers (DirecTV, EchoStar, and Motorola Authorization Center) to provide timely subscriber counts — Time Warner Cable made Section 76.907(c) demands on both DirecTV and EchoStar. In response, DirecTV and EchoStar continued to maintain to Time Warner Cable's counsel that such information was readily available through SkyTRENDS. *See, e.g.,* Exhibit **A** (Letter from Merrill S. Spiegel, Vice President, Government Affairs, DirecTV, to Arthur H. Harding, dated Feb. 28, 2002) (taking the position that "[b]ecause the ZIP+4 data TWC is requesting is currently available through SkyTRENDS, DIRECTV will refer your requests to that program").

[22] *See Marcus Cable Associates, LLC,* 17 FCC Rcd 16652, n. 16 (Media Bur. 2002) *("Denton, Texas Order"*) (petition for reconsideration pending) (internal citations omitted).

pending for well over six months. Until recently. at least one of the direct-to-home ("DTH") providers made a practice of reporting receivers (*e.g.*, multiple outlets) and not subscribers. thus requiring cable opcrators, that were using the 5-digit ZIP code allocation methodology described below. to reduce the DTH penetration information they received by a unsubstantiated factor to account for such reporting inconsistencies. It is noteworthy that cable operators incur significant costs to obtain DTH penetration information through SkyTRENDS.[23] While Time Warner Cable does not object to obtaining DTH penetration information through SkyTRENDS, and agrees that. while not perfect. this process represents the best alternative available for obtaining DTH subscriber data,[24] cable opcrators, LFAs, and the Commission are entitled to assurances that the satellite industry is providing timely, complete and accurate data.[25]

To ensure access to the necessary dah, Time Warner Cable suggests several modifications to Section 76.907(c). First, the Commission should provide some teeth to the right under Section 76.907(c) to obtain a competitor's homes passed and subscriber numbers. Failure to provide a timely response should result in a fine for each day the competitor fails to respond after the 15-day deadline. Second, the Commission should revise Section 76.907(c) to explicitly provide **LFAs** the authority to request subscribership data from cable's competitors. Third, the Commission should require competitors to certify that the subscriber data provided is timely, accurate and complete and is compiled in accordance with the methodology outlined above in

[23] Of course. this would seem inconsistent with the Commission's expectation that competitors provide such information at their own expense. See *Rate Order* at ¶ 45.

[24] *See Falcon Cable Systems Company II*, I7 FCC Rcd 4648, ¶ 7 (Cable Serv. Bur. 2002) ("*Twelve Oregon Cities Order*") (accepting the "Sky Trends data . . . because it is the best available source for deterinining DBS subscribership in such zip code areas").

[25] Cable operators face similar frustrations in seeking to obtain data from other competitors, including SMATVs. Assuming that the cable operator can even identify the SMATV owner, (footnote continues)

Section I.B.1. These simple changes will serve to facilitate this process and make it more meaningful, as well as allay LFA concerns regarding their inability to verify SkyTRENDS data.

3. Number of Competitors

The competing provider test requires that "the franchise area is – (i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area."[26] The statute on its face makes clear that this test is met where consumers have a choice among two MVPDs -- the incumbent and at least one competitor that is not affiliated with the incumbent. Despite numerous cases applying this principle;[27] some oppositions remain confused on this point, so the Commission should take this opportunity to reiterate that the first prong of the competing provider test is met in any case where the "cable operator and a competing provider each offer comparable programming to at least 50% of the households."[28]

C. DBS-Based Competing Provider Test

The Commission has sanctioned the use of two alternative means for establishing effective competition relying on DTH satellite providers, including DirecTV and EchoStar. The

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which is no easy task, many times Section 76.907(c) requests simply go unanswered by SMATV operators.

[26] *See* 47 U.S.C. § 543(l)(1)(B)(i); 47 C.F.R. § 76.905(b)(2)(i).

[27] *See, e.g., Falcon Telecable*, 10 FCC Rcd 1654 (Cable Serv. Bur. 1995); *Blue Ridge Cable Television. Inc.*, 11 FCC Rcd 8039 (Cable Serv. Bur. 1996); *Americable International Arizona Inc.*, 11 FCC Rcd 11588 (Cable Serv. Bur. 1996); *Time Warner Entertainment*, 12 FCC Rcd 2531 (Cable Sew. Bur. 1997); *Paragon Communications and Time Wurner Entertainment-Advance/Newhouse Partnership*, 13 FCC Rcd 5913 (Cable Serv. Bur., 1997).

[28] *See NPRM* at n. 6.

Commission has approved use of either SkyTRENDS' ZIP+4 methodology[29] or a 5-digit ZIP code allocation methodology[30] for determining those DTH subscribers that are located within a particular franchise area.

1. ZIP Code Identification Methodologies

Time Warner Cable's recent experiences using the *San Luis Obispo* methodology and arguments raised in opposition highlight some of the difficulties associated with identifying those ZIP codes that correspond. in whole or in part, with franchise areas and the variety of resources that might bc used in this process. For example, Time Warner Cable understands that there are many of ZIP code changes each year – additions. deletions. splits, and other modifications. In addition. political boundaries sometimes change, *e.g.*, through annexations. Moreover. to the best of Time Warner Cable's knowledge, there is no generally accepted source that can bc used to identify all ZIP codes falling within particular political subdivision boundaries.

a. *SkyTRENDS' ZIP Code Identification Process*

In an attempt to overcome these deficiencies and minimize oppositions on ZIP code identification issues, Time Warner Cable has worked with SkyTRENDS to develop a method to efficiently identify those 5-digit ZIP codes associated with a particular franchise area. This process employs mapping software and 5-digit ZIP code boundary software, which are based on

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[29] *See, e.g., Denton, Texas* **Order:** *see also In the Matter of Vicksburg Video, Inc. d/b/a WEHCO Video, Inc.*, 17 FCC Rcd 16659 (Media Bur. 2002); *In the Matter of Kilgore Video, Inc. d/b/a WEHCO Video. Inc.*, 17 FCC Rcd 16662 (Media Bur. 2002); *Twelve Oregon Cities Order*.

[30] *Charter Communications Properties, LLC*, 17 FCC Rcd 4617 (Cable Serv. Bur. 2002) ("*San Luis Obispo Order*"); *See also Charter Communications*, 17 FCC Rcd 15491 (Media Bur. 2002); *Falcon First, Inc* . 17 FCC Rcd 16629 (Media Bur. 2002); *Falcon Community Cable, L.P.*, CSR 5964-E. **DA** 02-2977 (Media Bur. rel. Nov. 4, 2002).

U.S. Census Bureau data and U.S. Postal Service data, respectively.[31] In addition to being efficient and cost-effective and using reliable data sources, this process allows for consistency and objectivity. Time Warner Cable therefore requests that the Commission acknowledge that ZIP codes identified through this process presumptively represent the universe of ZIP codes that correspond, in whole or in part, to a particular franchise area. Naturally, interested parties would have a full opportunity lo prove any discrepancies, for example, through the submission of detailed maps.

b. ZIP *Code Identification* ***Pre-Screening***

In the alternative, Time Warner Cable suggests that the Commission adopt a process whereby the cable operator submits to the LFA the list of those ZIP codes believed to cover, in whole or in part. the franchise area. The LFA would have 15 days to object to this list and to propose any specific additions or deletions. The failure to object would create a binding presumption that the list of ZIP codes is appropriate. In the event an **LFA** objects to the inclusion/exclusion of particular ZIP codes. it would need to provide evidence supporting its assessment of the ZIP codes associated with the franchise area. In its sole discretion, the cable operator could then rely on its original list, the LFA's list or a combination thereof. Should the cable operator rely on the list that the LFA provides. the LFA would be barred from objecting; otherwise, the cable operator would have to defend the validity of the ZIP code list it uses in the face of any objection.[32]

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[31] *See* Exhibit B (SkyTRENDS' ZIP Code Identification Methodology).

[32] The efficacy of this approach was demonstrated recently in connection with the pending effective competition determination request for Cary. North Carolina (CSR-5940-E). In that proceeding. the Town of Cary questioned whether some of the zip codes relied upon by the petitioner in fact covered any portion of the Town. Unable to independently verify these facts, the Deputy Chief. Policy Division, Media Bureau wrote to counsel for petitioner and requested (footnote continues)

2. Availability to At Least 50 Percent of the Households

As noted above, the first prong of the competing provider test requires that a franchise area is "(i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area."[33] In an effort to streamline the effective competition process, the Coinmission may take official notice that as a result of their now ubiquitous availability, DirecTV and EchoStar ("DBS Providers") satisfy this prong

Service of a MVPD is "offered' for purposes of effective competition

> (1) [w]hen the multichannel video programming distribulor is physically able to deliver service to potential subscribers, with the addition of no or only minimal additional investment by the distributor, in order for an individual subscriber to receive service; and (2) [w]hen no regulatory, technical or other impediments to households taking service exist, and potential subscribers in the franchise area are reasonably aware that they may purchase the services of the multichannel video programming distributor.[34]

that the parties attempt to agree to a stipulation as to the appropriate list of zip codes. Petitioner sent its proposed stipulation to the Town on November 26, and the Town promptly agreed to the proposed stipulation on November 27. This example serves to demonstrate how a pre-screening approach might create efficiencies for all affected parties and that the IS-day time frame suggested by Time Warner Cable is more than adequate.

[33] *See* 47 U.S.C. § 543(l)(1)(B)(i); 47 C.F.R. § 76.905(b)(2)(i).

[34] 47 C.F.R. § 76.905(e).

Each element of this prong is satisfied as follows:

> *Physical Availability.* Insofar as the Commission has repeatedly determined that DBS service is technically available due to its nationwide satellite footprint throughout the entire continental United States,” it has properly taken official notice that the DBS Providers are “physically able” to offer service to subscribers in all franchise areas.
>
> *No Regulatory, Technical or Other Impediments Exist.* The DBS Providers’ services are deemed to be technically available in a franchise area if their satellite footprints cover the franchise area and there are no local regulations prohibiting reception by home satellite dishes.[36] Indeed, it would appear that any such restriction would violate Section 207 ofthe Telecommunications Act of 1996 and Section 25.104 of the Commission’s rules.” Further, the DBS Providers do not need franchises in order to operate within a franchise area. As such, there are no regulatory. technical or other impediments that restrict the ability of a consumer to obtain service from a DBS Provider.
>
> *Reasonable Awareness of Availability.* The Commission has indicated that “awareness may he accomplished through any sort of local, regional or national media, provided that such media reach the community in question.”[38] It has also relied on evidence that the competing MVPD has customers in the affected community to demonstrate that potential subscribers are reasonably aware of their ability to receive service from an alternative provider.[39] Given the DBS’ Providers extensive national, regional and local marketing and advertising efforts,[40] plus their

[35] *See Time Warner.Entertainment-Advance/Newhouse Partnership*, 17 FCC Rcd 6370, ¶ 2 (Media Bur. 2002) *(“Dunedin, Florida Order“); Twelve Oregon Cities Order* at ¶ *3; Texas Cable Partners, L.P.*, 17 FCC Rcd 6373, ¶ 3 (Media Bur. 2002) (*“Harlingen, Texas Order”); San Luis Obispo Order* at ¶ *5; FrontierVision Operating Partners*, 16 FCC Rcd 5228, ¶ 3 (Cable Serv. Bur. 2001) (*“Various Vermont Communities Order’.).*

[36] *See Rate Order* at ¶ 32.

[37] *See* Telecommunications Act of 1996. Pub. L. No. 104-104, 110 Stat. 56 (1996), § 207; see *also* 47 C.F.R. § 25.104.

[38] *See Rate Order* at ¶ 32.

[39] *See Kansas City Cable Partners*, 16 FCC Rcd 18751, ¶ 6 (Cable Serv. Bur. 2001); *Time Warner Entertainment Company, L.P.*, 16 FCC Rcd 7537, ¶ 6 (Cable Sew. Bur. 2001).

[40] According to trade press reports, DirecTV spent $90 million in advertising in 1999 and over $200 million in 2000, including over $150 million in the last quarter of 2000 alone. *See* “DirecTV Breaks Deutsch Ad.” *Advertising Age*, October 24, 2000; “DirecTV Breaks $20 Mil Effort From Deutsch,” *Advertising Age,* January 22, 2001. According to its most recent 10-K filing with the Securities and Exchange Commission, the DISH Network spent $139 million on advertising in 2000 and $1 47 million in 2001. *See* EchoStar Communications Corp., *Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 for the Fiscal Year Ended Drcemher 3f. 2001,* Form 10-K, File No. 0-26176, at 39. The DBS Providers also (footnote continues)

significant penetration." the Commission should take official notice that potential subscribers are reasonably aware of DBS' availability. This would simplify the petition process by eliminating the need to provide DBS advertising and marketing materials.

> *Program Comparability.* The programming offered by a competing MVPD is deemed "comparable" if it includes "at least 12 channels of video programming, including at least one channel of nonbroadcast service programming."[42] The Commission has repeatedly found that the DBS Providers offer "comparable" programming.[43] It therefore should take official notice to this effect, thus eliminating the need to include channel line-ups as part of each effective competition petition.[44]

In light of the ample evidence satisfying each clement of the first prong of the competing provider test. the Commission should take official notice that such prong is satisfied. This measure would considerably streaniline the process and obviate the need to repeatedly recite these mechanical showings in each effective competition petition

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maintain comprehensive websites through which consumers can learn more about local retail outlets and how io buy the necessary equipment online or through a toll-free number. See 'iL?.\rw.dishnetwork.comand www.directv.com. *See Rate* **Order** at n. 104 ("[W]e believe that regional or local marketing, such as by a national or regional 800 telephone number. would suflice.").

[41] See NCTA Video Competition Comments at 13-14 (noting that 44 states have DTH penetration in excess of 15 percent as of April 2002).

[42] *See* 47 C.F.R. § 76.905(g)

[43] *See The Helicon Group, L.P.*, 17 FCC Rcd 16636. n. 8 (Media Bur. 2002) ("While Charter did not provide in its Petition a copy of EchoStar's nationwide channel lineup, which is otherwise available at www.dishnetwork.com, we have consistently found that the programming of both DBS providers satisfies the programming compatibility component of the competing provider effective competition test."); *see also Denton, Texas* **Order** at ¶ 4; *Dunedin, Florida Order* at ¶ 2; *Twelve Oregon Cities* **Order** at ¶ 3; *Harlingen, Texas Order* at ¶ 3; *Sun Luis Obispo Order* at ¶ 5; *Various Vermont Communities* **Order** at ¶ 3. Moreover. the DBS Providers satisfy the program comparability standard regardless of whether they provide local-into-local service. *See Falcon Telecable*, CSR 5986-E. DA 02-3140, ¶ 4 (Media Bur. rel. Nov. 14, 2002) ("[T]he Commission's effective competition program comparability standard does noi include a local television programming componeni.").

[44] Notwithstanding repeated recitals to this general effect, the Commission's decisions routinely make reference to the channel line-ups provided by many cable operators. By taking official notice. any doubt as to the need to provide such documentation will be resolved.

3. Largest MVPD Issues

Section 623(l)(1)(B)(ii) of the Communications Act requires a showing that the combined penetration of all MVPDs "other than the largest" exceeds 15 percent.[45] Given that SkyTRENDS refuses to provide a break out of individual DTH provider's subscriber data,[46] in cases where the cable operator's subscriber total does not exceed aggregate DTH penetration, it is impossible to demonstrate which MVPD is the largest. The Commission therefore should clarify that the phrase "other than the largest" MVPD in Section 623(l)(1)(B)(ii) was simply based on the assumption that the "incumbent" MVPD would typically be the "largest" MVPD in a particular franchise area, and thus would be the party most likely to seek effective competition relief. Certainly Congress could not have intended to preclude effective competition relief to MVPDs other than the "largest" MVPD. especially where the smaller MVPD can demonstrate that it faces competition from MVPDs with aggregate penetration of 15 percent or more. notwithstanding that one or more of the competing MVPDs may be larger than the MVPD seeking effective competition relief. Thus, Section 76.905(b)(2)(ii) of the Commission's rules should be amended to change the phrase "other than the largest multichannel video programming distributor" to read "other than the multichannel video programming distributor seeking an effective competition ruling."

[45] *See Time Warner Entertainment Co., L.P. et al. v. FCC*, 56 F.3d 151 (D.C. Cir. 1995) (holding that the subscribership of all MVPDs, other than the largest MVPD, may be aggregated to satisfy the 15 percent threshold). *See also* 47 C.F.R. § 76.905(f).

[46] *See* Exhibit C (Letter from Doug Larson, SkyTRENDS, to Gary Matz, Esq., Time Warner Cable, dated June 11, 2002).

D. LEC Test

In the *Cable Reform Order*, the Commission concluded that "a LEC's presence can have a competitive impact on a cable operator before the LEC finishes installing its plant or rolling out its services."[47] The Commission therefore concluded generally that in order to demonstrate effective competition from a LEC:

> If the LEC has not completed its buildout or roll out, the incumbent cable operator must establish thai the LEC intends to do so within a reasonable period of time, that the LEC does not face regulatory, technical or other impediments to households taking service. that the LEC is marketing its service so that potential customers are reasonably aware that they will be able to purchase the service, that the LEC has begun actual commercial service, the extent of that service. the ease with which service can be expanded, and the estimated date for completion of the construction or rollout in the franchise area.[48]

In various decisions applying the LEC test, the Commission has repeatedly recognized that a LEC's presence does in fact have a significant competitive impact upon a cable operator long before the LEC builds out its plant.[49] Despite this straight-forward directive, which is entirely consistent with repeated pronouncements thai the LEC test contains no minimum homes passed or penetration threshold. LECs continue to argue that effective competition determinations should be withheld until the LEC completes construction to some nebulous "substantial" portion of the franchise area. For example, NATOA unfairly characterizes the

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[47] *Implementation of Cable Act Provisions of the Telecommunications Act of 1996,* Report and Order. 14 FCC Rcd 5296, ¶ 11 (1999) ("*Cable Reform Order*").

[48] *See id.* at ¶ 13.

[49] *See, e.g., Cablevision of Boston, Inc.*, 17 FCC Rcd 4772 (2002), *affirming* 16 FCC Rcd 14056 (Cahle Serv. Bur. 2001); *Texas Cable Partners*, 17 FCC Rcd 4377 (Cable Serv. Bur. 2002); *Time Warner Entertainment-Advance/Newhouse Partnership*, 17 FCC Rcd 6361 (Cable Serv. Bur. 2002): *Armstrong Communications, Inc. v. Mount Pleasant Township, PA*, 16 FCC Rcd 1039 (Cable Serv. Bur. 2001); *Time Warner Entertainment-Advance/Newhouse Partnership*, 12 FCC (footnote continues)

Commission's decisions to find effective competition under the LEC test in instances where the competitor has not yet completed its buildout as "show[ing] a disturbing willingness to ignore present economic facts in favor of a rosy vision of coming competition." and at least in one case, suggesting that the Commission should have not "ignored the facts of the more recent downturn in the telecommunications industry. the specific financial difficulties faced by [the LEC], the company's slowdown of construction . . . , and explicit statements by [the LEC] that it would not be able to meet its build-out schedule. . . ."[50]

The Commission's priority must be to protect competition, not specific competitors."[51] Industry-wide and company-specific financial problems, however unfortunate and distressing, cannot serve as a basis to ignore the competitive realities in a particular situation. Congress and the Commission have set forth the circumstances pursuant to which LECs are considered to provide effective competition – edicts that cannot simply be ignored because of financial circumstances faced by a particular competitor.

Perhaps the most contentious issue in this area involves ascertaining what constitutes a "reasonable" period of time for a competitor to be required to build out under its franchise. Time Warner Cable suggests that the Commission establish a presumption that the buildout timetable established by the LFA in the franchise agreement with the LEC will be deemed *per se* reasonable. LFAs are sophisticated bargainers that have familiarity with local construction

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Rcd 3143 (Cable Serv. Bur. 1997) (all finding LEC effective competition when only a portion of the franchise area was built out by the competitor).

[50] NATOA Comments at *35-36* (internal citations omitted)

[51] *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (noting that antitrust laws are designed to protect competition, not competitors); see *also Applications of Nextel Communications Inc. For Transfer Of Control Of OneComm Corporation, N.A., And C-CALL Corp.*, 10 FCC Rcd 3361, ¶ 30 (February 17. 1995) (in finding the Nextel/OneComm (footnote continues)

conditions and best understand the nuances of their own communities. Indeed, LFAs have a statutory obligation to ensure that a reasonable period is allowed for construction to be completed throughout the proposed service area.[52] As long as the LFA has met its statutory obligation by including a provision in the franchise requiring construction that will ultimately result in a "substantial overlap" of service areas according to an established timetable, that timetable must be considered reasonable. It would be counterproductive for the Commission to engage in second-guessing on a case-by-case basis whether the LFA's adoption of a 3, 4½ or 6-year build out requirement is "reasonable" for its particular community. Thus, any buildout timetable that has been approved by the LFA should be deemed to satisfy the test.

The proceeding also provides the Commission with a convenient opportunity to resolve the issues raised by the Petition for Declaratory Ruling filed last spring by Grande Communications. Inc. ("Grande").[53] As discussed above: Section 76.907(c) of the Commission's rules requires competitors to provide numerical totals regarding subscriber reach and penetration within 15 days of a cable operator's request. Grande requested clarification as to whether it was obligated to provide such information once Time Warner Cable had already filed a petition seeking a finding of effective competition using the LEC test. In its filing, Time Warner Cable had pointed out that the LEC's penetration should not be relevant in LEC test

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merger to be consistent with antitrust principles, the Commission noted that its "priority is to protect competition. not competitors. for the benefit of consumers.").

[52] 47 U.S.C. § 541(a)(4)(A).

[53] ***See*** *Grande Communications, Inc.*, Petition for Declaratory Ruling on the Application of 47 C.F.R. § 76.907(c) to a Pending Petition for Determination of Effective Competition Under the LEC Test, CSR 5x69-E (filed Mar. 12,2002).

cases.[54] In opposition, both Grande and the City of Austin argued that the Grande's penetration is not only relevant: it is dispositive.”

Remarkably, despite making this argument. Grande refused to provide current subscriber totals, using Time Warner Cable's assertion that the information is not relevant for purposes of the LEC test as a pretext. The Commission properly favors full disclosure of relevant facts by the affected parties in effective competition proceedings.[56] Because of Grande's stonewalling. Time Warner Cable has been unahlc to update the record. To end Grande's gamesmanship. the Commission should clarify that in a LEC test proceeding, a cable operator may request and obtain a competitor's subscribership information pursuant to Section 76.907(c) where an opposing party. such as the LEC or a franchising authority, has raised a lack of penetration as a defense.

By making the foregoing clarifications and adopting the proposed minor changes, the Commission's actions will serve to align the effective competition process with today's competitive realities, ensure access to information necessary to meaningfully assess the specific competitive situation relative to particular communities, and streamline the administration of effective competition rulings.

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[54] *See Time Warner Entertainment-Advance/Newhouse Partnership*, Petition for Special Relief (Austin, Texas), CSR 5701-E (filed May 11,2001).

[55] *See Opposition* filed by Grandc (filed Jan. 9. 2002) and *Opposition* filed by the City of Austin (filed Jan. 31, 2002). CSR 5701-E.

II. GEOGRAPHIC KATE UNIFORMITY

A. Geographic Rate Uniformity Allegations Require Case-by-Case Adjudication.

In its comments, Everest Midwest LLC d/b/a Everest Connections ("Everest") urges the Commission to use this rulemaking proceeding to resolve various pending cases involving geographic rate uniformity issues.[57] Most of these disputes involve incumbent cable operator petitions for special relief seeking determinations of effective competition for specific cable systems which have been opposed by an ovcrbuilder such as Everest. Each of the proceedings cited by Everest have been fully briefed, and one has even been decided recently.[58] In connection with its questionable efforts to seek resolution of these pending cases in this rulemaking, thereby evading the *ex parte* restrictions[59] and carefully crafted procedural requirements set forth in Section 76.7 of the Commission's rules, Everest urges the agency to respond to numerous leading questions that apparently have been deliberately phrased in an effort to elicit the responses desired by Everest. Upon even cursory analysis, it is evident that Everest's questions are based on faulty legal and factual premises.[60]

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[56] *See Cablevision of Boston, Inc.*, 17 FCC Rcd 4772, ¶¶ 12-13 (2002).

[57] Everest Comments at 2-8.

[58] *Altrio Communications, Inc. v. Adelphia Communications Corporation*, CSR 5862-R, DA 02-3172 (Media Bur. rel. Nov. 15, 2002).

[59] To the extent Everest is attempting to make substantive presentations involving non-exempt proceedings in order to affect the outcome of those proceedings, such actions would constitute direct violations of the Commission's ex *parte* rules. See 47 C.F.R. § 1.1208.

[60] For example. the first question posed by Evcrest is premised on Everest's assertion that "there is no dispute between incumbent cable operators and LECs that the incumbent must show that the LEC's system 'substantially overlaps' the incumbent's system before the incumbent will be deemed to be subject to effeclivc competition." Everest Comments at 4. To the contrary, as Time Warner Cable has shown in Section I.D of these reply comments, the Commission has determined that a LEC's presence can have competitive consequences long before its construction is substantially complete.

The Commission should decline Everest's invitation to resolve the cited special relief proceedings in the context of this rulemaking. Time Warner Cable certainly agrees that several of the proceedings cited by Everest have been pending for substantial periods and are ripe for decision. However, each such procceding involves a unique set of facts and circumstances, and thus each case is best resolved on the basis of the individual record developed in the applicable proceeding.

Indeed. given the complexity of many of the issues and the particularized factual situations presented. it is apparent that this rulemaking proceeding is not the proper forum for resolution of such cases. For example, in several cases, Time Warner Cable has noted that various claims relating to geographic rate uniformity are baseless because they involve promotional discounts.[61] Everest concedes that promotional offers are exempt from the geographic rate uniformity restrictions.[62] Such promotional rate issues are highly fact specific in terms ofpricing. eligibility, terms and conditions, marketing. etc. and therefore are best evaluated on the record developed through an adjudicatory process. Moreover, Everest's request for a rigid I?-month limit on the availability of promotional discounts would not only unreasonably restrict the ability of consumers to reap the benefits of competition. hut it would inhibit the Commission's discretion to evaluate the reasonableness of particular promotional offers on the basis of the unique facts and circumstances of each situation. Similarly, Everest's

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[61] *See Time Warner Entertainment-Advance/Newhouse Partnership, Petition for Special Relief* (Austin, TX), CSR-5701-E (filed May 11, 2001); *Complaint of Everest Connections* (Kansas City, MO). CSR-5845-R (filed Feb. 1. 2002).

[62] Everest Comments at *6*.

suggested requirement that promotions bc marketed throughout the applicable franchise area would serve lo eviscerate promolions as an exception to the geographic rale uniformity rule.[63]

B. Section 76.984(a) of the Commission's Rules Should Be Amended in Light of CPST Deregulation.

Consistent with the Commission's intent as expressed in the *NPRM* to revise its "cable television rate regulations in light of the March 1999 end of cable programming service tier regulation,"[64] Section 76.984(a) of the Commission's Rules should be amended to delete the reference Lo cable programming service tiers ("CPST"). Given the March 31, 1999 sunset of CPST rate regulation, Section 623(d) of the Act and Section 76.984 which implements it, very clearly now only apply to the basic service tier and associated equipment. This fact has been recently recognized by the Commission: "Section 76.984 of the Commission's rules prohibits incumbent cable operators from engaging in geographic price discrimination with respect to programming in the basic tier, in the absence of effective competition."[65] However, the text of Section 76.984 still does not reflect this change. Time Warner Cable therefore urges the Commission to amend Section 76.984 of its rules accordingly

Updating the rule will avoid any unnecessary confusion about whether the geographic uniformity requirement legally applies to CPST rates. Indeed. contrary to claims by some,

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[63] Similarly, the Commission should reject Everest's proposal to adopt "predatory pricing" regulations for residential cable rates. Everest Comments at 7. There is simply no statutory jurisdiction for the Commission to wade into the complex issues that would result from entertaining such predatory pricing complaints that involve issues better handled by the relevant antitrust agencies. See *Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, lo AT&T Comcast Corporation. Transferee,* Memorandum Opinion and Order, FCC 02-310 (rel. Nov. 14. 2002), at ¶ 122 ("*AT&T/Comcast Order*"):*Armstrong Communications. Inc. v. Mount Pleasant Township, PA*, 16 FCC 1039, n. 34 (Cable Ser. Bur. 2001).

[64] *See NRPM* at ¶ 1

[65] *See AT&T/Comcast Order* at n.325

Section 623(d) does not "by its express terms'' or otherwise cover "uniform pricing of both basic service and the cable programming service tiers."[66] In *Time Warner Entertainment Co. v. FCC*, the D.C. Circuit held that the geographic uniformity requirement "is clearly a form of rate regulation" under Section 623 and therefore the requirement may only be applied to rates which themselves are subject to rate regulation under Section 623.[67] Thus, the requirement does not apply to any services offered by a cable system that is subject to effective competition because its services are no longer subject to rate regulation under Section 623.[68] Likewise, the requirement does not apply to any cable service. such as a pay-per view or a premium service, that has been explicitly excluded from rate regulation under Section 623,[69] and is also not applicable to unregulated services such as cable modem service.[70] Given the March **3 l,** 1999 sunset of CPST ratc regulation, Section 623(d) now applies exclusively to the basis service tier and associated equipment, but no longer applies to CPST or to packaged offerings involving discounts to unregulated components of such packages.

When the Commission promulgated Section 76.984(a) to implement the "gcographically uniform ratc structure" provision of' Section 623(d), the Commission concluded that "Section 623(d)'s focus is properly on <u>regulated services</u> in regulated markets."[71] At the time, the rule was drafted to reflect that regulated services included both basic service and cable programming service. The rule has never been updated in light of the fact that rate regulation. and thus the geographic uniformity restriction, now applies <u>only</u> to basic cable service and associated

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[66] Everest Comments at 5.

[67] 56 F.3d 151. 190-191 (D.C. Cir. 1995).

[68] *Id.*

[69] ***See*** *Rate Order* at ¶ 421.

[70] *Kansas City Cable Partners* , 16 FCC Rcd 18751, ¶ 10 (Cable Serv. Bur. 2001).

equipment. Thus, the Commission should take this opportunity to dispel any further confusion about the current state of the law by revising Section 76.984(a) such that it is fully consistent with Section 623(d) and the March 31, 1999 sunset of CPST rate regulation, as well as with the court's decision in *Time Warner Entertainment Co. v. FCC*.

III. BST CHANNEL ADDITIONS OR DELETIONS

In the *NPRM*, the Commission acknowledged that "operator and franchising authority practices with respect to channel deletions and channel movements have varied considerably" due to disagreements over the scope of the sunset provision in Section 76.922(g)(8) of the Commission's rules." That sunset provision plainly states that "Paragraph (g) of this section shall cease to be effective on January 1, 1998 unless renewed by the Commission."[73] The provisions terminated on the face of this sunset provision include Sections 76.922(g)(4)–(5), which required a pro-rata "residual" adjustment when channels were deleted from the BST or shifted between the BST and CPST. The fact that the Commission never acted to "renew" these provisions prior to January 1, 1998 is beyond dispute.

Stating that the intent of the sunset provision "has been the subject of some debate," the Commission solicited comment on how its rules regarding the impact of channel line-up changes on regulated rates should be "revised or interpreted," including whether the "pro-rata" rate adjustment methodology contained in Section 76.922(g)(4) should be "reinstated."[74] The Commission also attempted to clarify, on an interim basis, how rates should be adjusted to

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[71] *Rate Order* at ¶ 421 (emphasis added).

[72] *NPRM* at ¶¶ 16, 55.

[73] 47 C.F.R. § 76.922(g)(8).

[74] *Id.* at ¶¶ 15, 18, 20.

account for BST channel changes." However, less than two months after issuing this interim clarification, the Commission. on its own motion, reconsidered its decision, acknowledging that cable operators reasonably could have understood the sunset provision to have eliminated the pro-rata residual adjustment methodology.[76]

Notwithstanding the foregoing, NATOA has attacked the Commission for suggesting that its rules were at all ambiguous and for offering any relief to cable operators who acted in reasonable reliance on the plain language of a published FCC regulation.[77] Furthermore, NATOA targets Time Warner Cable specifically, suggesting that Time Warner Cable's strict interpretation and application of the sunset provision in cases involving the movement of channels from BST to CPST was "absurd" and "*couldnor* have been adopted by Time Warner in good faith."[78] The *ad hominem* accusation leveled by NATOA against Time Warner Cable is particularly disappointing and beyond the pale of reasonable advocacy. especially given that it is based on willful distortions of the language and history of Section 76.922(g) by NATOA.

First, in applying a straight-forward interpretation of the sunset provision, Time Warner Cable simply was following the plain language of Section 76.922(g)(8). That language expressly states that the sunset applies to "Paragraph (g) of this section," without limitation lo particular portions ol'paragraph (g). Thus, under well-settled principles of statutory and regulatory construction. Time Warner Cable was absolutely justified in reading the sunset provision as terminating. *inter alia,* the residual adjustment provisions in Section 76.922(g)(4) and (5).

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[75] *Id.* at ¶ 55

[76] *See In the Matter of Revisions to Cable Television Rate Regulations,* Order, 17 FCC Rcd 15974, ¶ 2 (2002) (revising ¶ 55 of the *NPRM*) *("Rare Regulation Rulemaking Order").*

[77] NATOA Comments at 40-46.

[78] NATOA Comments at 42-43 (emphasis **in** original).

Indeed, adopting an interpretation of the plain language of Section 76.922(g)(8) that effectively would insert within it a condition preserving certain provisions of Section 76.922(g), while allowing others to sunset, "is not to construe the [provision] but to amend it."[79] NATOA chastises those who seek to abide by the plain language of FCC regulations as overly "literalist."[80]

NATOA specifically accuses Time Warner Cable of acting in bad faith by relying on the plain language of Section 76.922(g)(8), suggesting that Time Warner Cable was attempting to take advantage of a "typographical error."[81] This contention on the part of NATOA simply is not credible. The language of Section 76.922(g)(8) at issue has existed unchanged as part of the Commission's rules since 1994. Moreover, in its 1999 "regulatory streamlining" proceeding, the Commission rejected a specific request that it adopt language clarifying that the sunset provision did not terminate all of the provisions of Section 76.922(g).[82] In other words, the Commission's actions since 1994 are completely consistent with the conclusion that the broad scope of Section 76.922(g)(8) was intentional, not accidental.[83]

[79] *See Detroit Trust Co.* v. *The Thomas Barlum,* 293 U.S. 21, 38 (1934).

[80] NATOA Comments at 42.

[81] *Id.*

[82] *See In the Matter of 1998 Biennial Regulatory Review -- Streamlining of Cable Television Services Part 76 Public File and Notice Requirements,* Report and Order, 14 FCC Rcd 4653, ¶ 31 (1999) *("Public File Streamlining Order").*

[83] As indicated, in the *NPRM*, the Commission raised the issue of whether the pro-rata residual adjustment methodology should be "reinstated." *NPRM* at ¶ 20. In the regulatory streamlining rulemaking, the Commission made a similar comment, noting that the requested "clarification" of Section 76.922(g)(8) required "reinstatement" of the provision in question. *See Public File Streamlining Order* at ¶ 31. Both of these Commission pronouncements are wholly consistent with the view that Section 76.922(g) sunset in its entirety on January 1, 1998 in accordance with its express terms.

Second. even if there was reason to look outside the plain language of Section 76.922(g)(8) in order to establish its meaning. the evidence overwhelmingly supports the conclusion that Section 76.922(g)(8) means precisely what it unquestionably says. This evidence includes not only the above-described refusal by the Commission to "fix" the provision in the regulatory streamlining provision. but also the adoption by the Commission of several rate decisions denying cable operators any adjustment (other than external costs) for channels added after January 1, 1998.[84] If the Commission did not intend for all of Section 76.922(g) to sunset on January 1, 1998, including the residual adjustment provisions, these cases would have been decided differently.

NATOA simply ignores this record and points instead to language in the rulemaking order that accompanied the adoption of the sunset provision in 1994.[85] According to NATOA.

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[84] *See, e.g., Cox Cable of Louisiana Metro System*, 13 FCC Rcd 24246, **78,** n.15 (Cable Serv. Bur. 1998); *Cable Michigan, Inc.*, 13 FCC Rcd 24228, ¶ 5, n.11 (Cable Serv. Bur. 1998) (explaining disallowance of adjusrment by referencing Section 76.922(g)(8) sunset provision).

[85] NATOA Comments at 40-41 (citing *In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking, 10 FCC Rcd 1226, ¶ 98 (1994)). In a vain effort to show that the sunset provision did not apply to the pro-rata residual methodology, NATOA also cites a decision issued by the Cable Services Bureau granting a stay of a local rate order in which the franchising authority ruled that the pro-rata residual rule had been sunset by Section 76.922(g)(8) and that the cable operator could not increase its BST rate when it shifted a channel to BST from CPST. NATOA Comments at 40, n.80 (citing *TCI Cablevision of Dallas, Inc.*, 14 FCC Rcd 9252 (Cable Serv. Bur. 1999) ("*Farmers Branch*")). Reliance on this decision is misplaced. **As** the Commission has consistently noted, including in the *Farmers Brunch* case itself. in cases in which other elements strongly favor interim relief, the Commission may exercise its discretion to grant a stay without establishing whether the petitioner is likely to succeed on the merits. *Id.* at ¶ 2; *see also Cablevision of New York, et. al.*, 10 FCC Rcd 12279 (Cable Serv. Bur. 1995) (granting stay of rate order without any assessment of likelihood of success on the merits in light of potential for irreparable harm to operator (who would not be able to recover revenues lost due to a forced rollback and/or refund payments) and the absence of harm to consumers (who can be made whole, if necessary, by refunds with interest)). In any event, the *Farmers Branch* stay order essentially lost my precedcntial value it might otherwise have had when the Cable Services Bureau, a year after granting the requested stay, granted a joint motion filed by the LFA and the (footnote continues)

the discussion surrounding the adoption of the sunset provision suggests that the Commission intended for paragraph (g) to "revert to the former language of that section."[86] However. to the extent that NATOA is suggesting that the former language of the rule would include the pro-rata residual adjustment methodology, they are again willfully misrepresenting the rule's history.

As the *NPRM* makes clear, the pro-rata residual adjustment methodology was lirst adopted in the same order as the CAPS adjustment rule and the sunset provision itself." Thus, the "former language" that NA'I'OA claims survived the sunset was the "per channel" (or "Mark-up") methodology first adopted in the *Second Order on Reconsideration, Fourth Report and Order. and Fifth Notice of Proposed Rulemaking*,[88] not the pro-rata residual.

Recognizing that the per channel adjustment rule was the "former" rule in effect prior to the adoption of both the sunset provision and the pro-rata residual methodology, the Commission acted to clarify its interim methodology for adjusting rates to reflect channel line-up changes so as to "grandfather" rate adjustments based on the per channel adjustment approach."' As indicated. NATOA believes that the Commission, in adopting this clarification, is "facilitating evasions" of its rules by cable operators. At the same time, NATOA asserts that the clarifying order is evidence that Time Warner Cable's position regarding the scope of the sunset provision

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cable operator to voluntarily withdraw and dismiss the pending appeal "without benefit of substantive Commission review." *TCI Cablevision of Dallas, Inc.*, 15 FCC Rcd 10889, ¶ 1 (Cable Serv. Bur. 2000). Indeed, the fact that the case remained pending for a year before it was withdrawn – notwithstanding the Commission's assertion that it expected "to address the merits of the operator's appeal quickly"– indicates that the substantive outcome of the case was not as clear as NATOA seeks to imply.

[86] NATOA Comments at 41-42,

[87] *NPRM* at ¶¶ 12-13, 55.

[88] 9 FCC Rcd 41 I9 (1994) (*"Second Reconsideration Order"*).

[89] *NPRM, supra.*

is “frivolous” and that Time Warner Cable could not ”conceivably have believed” that it was allowed to move channels from the BST to the CPST without at least applying the per-channel adjustment methodology.[90]

Again, the argument advanced by NATOA ignores the very plain language and history of the residual rule and the sunset provision. Time Warner Cablc‘s approach. which has been to adjust its rates to reflect the reduction in external costs associated with the moccnient of a channel or channels from the BST to the CPST, is absolutely consistent with the plain language of Section 76.922(g)(8), which nowhere provides for the resurrection of the per-channel adjustment methodology.” Furthermore, Time Warner Cable’s approach is completely consistent with. and dictated by, the decisions cited above in which the Commission itself, citing the sunset provision: refused to permit operators to take per-channel adjustments after December 31, 1997.[92] In short. Time Warner Cable’s position was not in any way frivolous or indicative of bad faith.

In conclusion, ‘Time Warner Cable submits chat. as proposed by NCTA in its comments, the Commission should “grandfather” existing rate calculations made on the basis of a good faith interpretation of Section 76.922(g)(8), including calculations that, consistent with the plain language of the sunset provision and the Commission’s own decisions, do not include any pro-rata or per-channel residual adjustment for the deletion of BST channels or the movement of

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[90] NATOA Comments at 44-45.

[91] Insofar as NATOA suggests that Time Warner Cable could not have believed that neither the per-channel nor pro-rata residual adjustment methodology survived the sunset of Section 76.922(g), it should be noted that the per-channel methodology itself was not adopted until the *Second Reconsideration* ***Order,*** nearly a year after the initial rate rules were implemented. **See** *NPRM* at ¶ 12.

BST channels to CPST.[93] Time Warner Cable also supports NCTA's proposal for the adoption of a new rule that would apply the per-channel adjustment methodology (determined without reference to unregulated CPST channels) on a going forward basis to BST channel additions, deletions, and shifts on an equal basis.[94]

[92] *See, e.g., Cox Cable of Louisiana Metro System, supra; Cable Michigan, Inc., supra. See also Public File Streamlining Order* at ¶ 31 (refusing to "reinstate" per channel adjustment methodology which had been sunset by Section 76.922(g)(8)).

[93] NCTA Comments at 4-5.

[94] *See also* Comcast Comments at 24-28; Cablevision Comments at 5-6; Cox Comments at 12-15.

CONCLUSION

Time Warner Cable reiterates its agreement with NCTA and others who suggest that the Commission's rules and policies relating to the regulation of cable rates can and should be updated in light of the sunset of CPST regulation without a major rewrite. Time Warner Cable endorses the proposals by NCTA to clarify and fine-tune numerous aspects of the Commission's cable rate regulation rules. Specifically. Time Warner Cable urges the Commission to adopt the various suggestions, set forth in detail in these reply comments, for streamlining the process for effective competition determinations; to revise Section 76.984(a) of its rules to delete the outdated reference to CPST; and to establish logical and easy to administer regulations to govern rate adjustments flowing from any future additions or deletions of channels from BST.

Respectfully submitted,

TIME **WARNER CABLE**

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Dated. December 4. 2002

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EXHIBIT A

DIRECTV

Merrill S. Spiegel
Vice President
Government Affairs

February 28,2002

Arthur H. Harding, Esq.
Fleischman and Walsh, L.L.P
1400 Sixteenth Street, NW
Washington, DC 200036

Dear Mr. Harding:

I am writing in response to you letter of February 13, 2002 to Robert **M.** Hall, General Counsel of DIRECTV, Inc., regarding data your client, Time Warner Cable (TWC), is seeking to obtain.

The data sought by TWC, pursuant to 47 C.F.R. § 76.907(c), is currently available, in a complete and accurate form, through the SkyTRENDS program. It is my understanding that while the difficulties **of** dealing with and verifying the multimillion-field ZIP+4 databases have occasioned delays in the past, that is no longer the case. I can assure you that SkyTRENDS receives accurate and complete data files from DIRECTV.

The numbers that TWC requests for purposes of preparing effective competition petitions are available within 15 days of a valid request. As you are aware, such a request must include complete and accurate information on the ZIP+4 areas covered by each franchise area under consideration. If such data is not easily obtainable by TWC, the SkyTRENDS program can offer assistance in compiling it.

Because the ZIP+4 data TWC is requesting is currently available through SkyTRENDS, DIRECTV will refer your requests to that program.

Sincerely,

Merrill S. Spiegel

Merrill S. Spiegel

cc: Robert M. Hall

EXHIBIT B

SKY
TRENDS

ZIP Code tion Methodology

How It Works

SkyTRENDS uses a two-stage process for identifying and mapping 5-digit U.S. Postal Service ZIP codes to cable franchise areas.

First, our cable clients provide SkyTRENDS with a list of franchise areas, associated counties and franchise type (city, village, town, unincorporated county, etc.).

Using Census boundary files and U.S. Postal Service ZIP code boundaries, SkyTRENDS maps all 5-digit ZIP codes to each franchise area. Because ZIP codes and place boundaries are managed by two different Federal agencies with two distinct purposes, these boundaries often do not match.

In order to find all of the ZIP codes associated with a franchise area, SkyTRENDS, using 3rd party mapping software, searches to find all cases where a ZIP code boundary intersects a franchise boundary. This results in a list of ZIP codes that are either wholly within, partially within or border on a franchise area – the "found set."

In addition to this "found set," the process also produces, for each ZIP code, the total square mileage of that ZIP code and the square mileage, which falls within the franchise area. This, in turn, yields a % overlap of the ZIP code in the franchise area.

SkyTRENDS does not provide direct-to-home (DTH) satellite subscriber reporting in cases where a ZIP code's geographical overlap into a franchise area is less than 1%. We assume, for purposes of this reporting, that these reflect the situation of a ZIP code simply bordering on –but not actually within or a part of—the franchise area.

The Software

The SkyTRENDS ZIP code identification process uses Dynamap®/5-Digit ZIP Code boundary software and StreetPro® boundary software.

The **Dynamap® 5-Digit ZIP Code** data product is a graphic representation of the ZIP Codes assigned by the U.S. Postal Service. The ZIP Code maps cover all fifty United States and the District of Columbia. The source of these data is Geographic Data Technology, Inc. (GDT). GDT created these data using a combination of its DYNAMAP/2000 data, the United States Postal Service (USPS) ZIP+4 Data File, the USPS National 5-Digit ZIP Code and Post Office Directory, USPS ZIP+4 State Directories, and the USPS City State File. The ZIP Code data is updated quarterly. The United States Postal Service has contracted directly with GDT to map all ZIP codes.

SKY TRENDS

StreetPro® was developed from Geographic Data Technology's (GDT) proprietary database of information, which was originally developed from U.S. Census Bureau's TIGER/Line files, and significantly enhanced from GDT's 5,200 data sources. The StreetPro software is updated annually. When running ZIP Code identification reports or ZIP+4 reports, SkyTRENDS always references the Census Bureau's Geographic Change Notes at http://eire.census.gov/popest/archives/files/boundary.php for any changes since the last updates.

Data Considerations

It must be recognized that the U.S. Postal Service adds, deletes, splits or otherwise modifies dozens of ZIP codes each month and these changes will not always be reflected in our identification reports due to lag times in software releases of the quarterly updates of Dynamap's 5-digit ZIP code files. Moreover, discrepancies among U.S. Postal Service files can occur, and ZIP codes and Census areas are managed by different agencies and are based on different methodologies/geographies, which can lead to boundary layering difficulties. Thus, while no known source can provide results that are always 100% accurate, we feel that our ZIP code identification process is the **best** available option for identifying franchises and their associated ZIP codes.

Please note that, as with our ZIP+4 reporting, the accuracy of the results will depend in large measure on correctly identifying the franchise areas at the outset.

EXHIBIT C

SKY
TRENDS

June 11.2002

Gary R. Matz, Esq.
Assistant General Counsel
Time Warner Cable
290 Harbor Drive
Stamford. CT 06904-2210

Gary:

This letter should serve to confirm that SkyTRENDS does not, under any circumstances, break out its direct-to-home (DTH) subscriber counts by provider. DTH counts are always provided as an aggregate total of Dish Network, DirecTV and C-Band subscribers by franchise area.

If you have any questions or concerns, please don't hesitate to call.

Sincerely,

Doug Larson
SkyTRENDS
(303) 271-9960

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CERTIFICATE OF SERVICE

I, Kyle A. Baker, a secretary at the law firm of Fleischman and Walsh, L.L.P., hereby certify that copies of the foregoing "Reply Comments" were served this 4th day of December, 2002. via first-class mail, postage prepaid. upon the following:

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